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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77145880
Applicant	Advanced Pavement Technology Inc.
Applied for Mark	ECOLOGICAL PAVER SYSTEMS
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Date	09/22/2009

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In re Application of:)	
)	Trademark ECOLOGICAL PAVER SYSTEMS
ADVANCED PAVEMENT)	
TECHNOLOGY INC.)	Law Office 106
)	
Serial No. 77/145,880)	Examining Attorney Bernice Middleton
)	
Filed April 2, 2007)	

REPLY TO EXAMINING ATTORNEY'S APPEAL BRIEF

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Sir:

This Brief is in reply to the Examining Attorney's Appeal Brief mailed September 2, 2009.

In Response to Applicant's Arguments that a Multi-Stage Reasoning Process [. . .] is Required to Discern the Nature of the Services Associated with the Mark, the Examining Attorney Resorts to Multi-Stage Reasoning to Argue the Examining Attorney's Asserted Meaning for the Term "Ecological"

At page 4 of the Examining Attorney's brief, a multi-stage reasoning process is used to assert the Examining Attorney's desired meaning for the term "ecological". More specifically, the Examining Attorney first references the term "ecology", rather than the actual term used in the mark, then argues that because one of the many definitions of the term "ecology" uses the phrase "detrimental effects", the Examiner was justified in substituting the term "environmental friendly", which the Examiner asserts without support is a "more common place term". The Examiner then asserts that because the term "ecology" is "the noun form of ecological", the term "ecological" would immediately convey that Applicant's services are "friendly rather than unfriendly or 'detrimental' to the environment", and therefore would immediately convey that Applicant's services involve paving systems that "prevent or reverse detrimental effects on the environment". It is respectfully submitted that the Examiner's multi-stage reasoning process proves Applicant's argument.

The Examining Attorney Continues to Rely on Unpersuasive and/or Obscure Citations

In response to Applicant's argument that the identical language mined by the Examining Attorney from two articles (Evidence 3-3 and Evidence 4-4 of the April 3, 2009 Office Action) were the result of carelessness by the copy writer in paraphrasing

of the Applicant's use of the mark, the Examining Attorney argues that somehow the existence of two articles utilizing identical language eliminates the possibility of careless copy writing. This argument by the Examining Attorney ignores the possibility that both of the articles¹ could have been generated by the same copy writer, which makes it quite reasonable to assume that the articles are exactly as asserted by Applicant, i.e., careless copy writing in an attempt to paraphrase the Applicant's use of its mark.

Next the Examiner attempts to rely on a so-called "green" website that references Applicant and again misuses Applicant's mark by paraphrasing it as "ecological pavers". This one time misuse of Applicant's mark by the "Green Building Council of Ventura County" is hardly persuasive evidence that "ecological pavers" is a commonly used or accepted term in the marketplace. Indeed, the fact that the Examining Attorney has to rely on such an obscure reference that misused Applicant's mark, again proves Applicant's arguments.

Similarly, the Examining Attorney again references the phrase "ecological pavers" that the Examining Attorney mined from the multiple pages of the meeting minutes from a 2004 City Council Meeting for the City of La Center, Washington. In an attempt to bolster this obscure reference mined using the power of the internet from the minutes of an obscure city council, the Examining Attorney asserts that the municipality "sought out a specific type of paver system, namely an ecological paver". However, there is nothing in the obscure minutes to indicate that the city sought out "ecological pavers". Again, the Examining Attorney's reliance on such an obscure reference

1 Or the paraphrasing used in the article.

illustrates that the term “ecological pavers” is not a commonly used or accepted term in the marketplace. Next, the Examining Attorney asserts that the ability to mine one Wikipedia article and three documents from a powerful LexisNexis search, somehow establishes usage in the marketplace. Applicant disagrees. Rather, the inability of the powerful LexisNexis search tool to locate more than the three references and one Wikipedia reference illustrates a lack of usage in the marketplace.

Finally, the Examining Attorney seeks to excuse the reliance on obscure references by asserting that paver systems such as those offered by the Applicant are “part of a new technology in an emerging industry such that large numbers of stories and cites are not yet available”. However, this argument supports Applicant’s argument that Applicant’s mark is not a commonly used or accepted term in the marketplace. Further, the idea that concerns for the environment and construction techniques that answer such concerns are new, is simply unsupportable. Such concerns have been widely held since at least the late 1960’s.

Conclusion

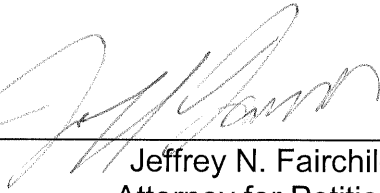
The Examining Attorney has established that a multi-stage reasoning process is required to discern the nature of the services associated with the mark, and has also established that Applicant’s mark is not a commonly used or accepted term in the marketplace.

In view of foregoing, Applicant respectfully requests reconsideration of the refusal based on descriptiveness and approval of the application.

Respectfully submitted,

WOOD, PHILLIPS, KATZ,
CLARK & MORTIMER

By



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September 22, 2009

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